BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HARRY M. TISDALE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,050,503
RGIS INVENTORY SPECIALISTS	)	
Respondent	)	
AND	)	
	)	
FIDELITY & GUARANTY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the July 6, 2010, preliminary hearing Order of Administrative Law Judge John D. Clark (ALJ). Claimant was awarded authorized medical treatment with Steven J. Howell, M.D., after the ALJ determined that claimant had suffered an accidental injury which arose out of and in the course of his employment with respondent and that respondent had notice of the job-related accident.

Claimant appeared by his attorney, Garry L. Howard of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Katie M. Black of Kansas City, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held July 6, 2010, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant provide timely notice of accident pursuant to K.S.A. 44-520? Respondent argues that claimant's notice did not arrive until April 27, 2010, when his attorney served notice upon respondent. Claimant contends notice was provided within 10 days of his learning that he had suffered a series of work-related accidents.

2. What is the date of accident in this matter? Claimant argues for a date of accident of April 13, 2010, when he was first advised, in writing by Dr. Howell, that he had suffered a work-related accident which led to his leg and foot problems. Respondent argues that Dr. Howell restricted claimant from work on April 23, 2009, and claimant failed to provide notice until April 27, 2010. Therefore, claimant's notice was out of time.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant had worked for several years as an area manager for respondent's inventory company. Claimant's job required that he be on his feet almost continuously. Claimant regularly worked 30 to 35 hours per week, with peek activity weeks requiring up to 60 hours per week. Approximately three years before the July 6, 2010, preliminary hearing, claimant began having foot and leg problems. Claimant's district manager noticed claimant limping one day and asked claimant if he had a problem. When claimant advised that he was having problems, he was advised to go to the doctor and have it checked out. Claimant went to his personal doctor, Mark A. Leiker, M.D., for an examination. After x-rays were taken, claimant was referred to orthopedic surgeon Steven J. Howell, M.D.

Dr. Howell first examined claimant on June 12, 2008. Claimant was diagnosed with a stress fracture of the left leg, and pain in the left leg and foot. The causal diagnosis was overuse, and the doctor noted that claimant spent a good deal of the day on his feet. A brace was placed on claimant's left leg, and he was returned to work. Dr. Howell continued to treat claimant conservatively, but claimant's condition worsened. By December 2008, claimant was experiencing bilateral knee pain and foot pain. An MRI of both knees was recommended. The MRI showed a bit of mild chondromalacia, but no meniscal tearing, bone bruising or arthritic changes. The knee and foot pain was deemed to be, at least partially, caused by the substantial amount of time claimant spent on his feet. A brace was placed on claimant's right foot.

The April 23, 2009, examination found bilateral foot, leg and knee pain. It was noted that claimant worked a significant number of hours on his feet. The report notes that claimant's job "is simply too demanding".[1] The plan noted in the report was to limit claimant to 40 hours per week, with no more than 20 hours standing/walking per week. If the employer cannot accommodate these restrictions, the report notes that claimant will pursue disability. The doctor prepared a work status report on April 23, 2009, limiting claimant to no more than 20 hours per week standing and walking. The work status report

[1] P.H. Trans., Cl. Ex. 2.

does not identify claimant's job as an offending activity with regard to his foot, leg and knee complaints. It merely states the work limitations. Claimant testified that he took the limitations to respondent, and they were honored. This record is not specific as to which sheet claimant took to respondent: the one with the work-related references or the work status sheet with only the restrictions. By August 19, 2009, the restrictions on claimant were listed as permanent. At the time of the preliminary hearing in this matter, claimant continued on the restricted work schedule.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[2]

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[3]

Respondent appeals both the notice provision of the statute and the date of accident. With the creation of K.S.A. 2009 Supp. 44-508(d), in instances where the alleged accident is a series over an extended period of time, it is necessary to determine the date of accident before the timeliness of the notice can be decided.

When claimant advised his district manager of his problems, he was told to seek medical treatment. However, claimant did not specify whether he told the manager that his problems were work related. Additionally, this record does not support a finding that the instructions by the district manager were tantamount to making claimant's trip to Dr. Leiker an authorized event. Without Dr. Leiker being authorized, the subsequent referral to Dr. Howell would also not be authorized. Therefore, the restrictions provided

---

[2] K.S.A. 44-520.

[3] K.S.A. 2009 Supp. 44-508(d).

claimant by Dr. Howell would not be from the authorized physician. Thus, the first two criteria contained in K.S.A. 2009 Supp. 44-508(d) have not been met.

This Board Member must next look to the date the employee gives written notice to the employer of the injury or the date the condition is diagnosed as work related, provided the diagnosis is communicated "**in writing**" to the injured worker. Claimant testified to taking the restrictions of Dr. Howell to his employer and those restrictions have been met. However, claimant did not specify whether the restriction sheet provided to respondent was the work status report of April 23, 2009, which does not identify claimant's job as the offender. Nor does claimant specify whether the sheet provided respondent was the April 23, 2009, examination report which was generated on April 27, 2009, which report does specify that claimant's job causes him pain and "**is simply too demanding**". If the work status report was provided to respondent, it does not provide notice of a work-related connection with claimant's physical problems. Therefore, claimant would not have been advised in writing of the work-related connection and respondent would not be on notice from the report of same. However, if the medical report of April 27, 2009, was the report provided to both claimant and respondent, then both would be on notice that claimant's job is simply too demanding and the work-related connection would be established. Here, the notice provision of the statute would be met on April 27, 2009. Unfortunately, this record does not specify which form was provided to respondent. So, that provision of K.S.A. 2009 Supp. 44-508(d) has not been met. The only provision remaining is the date upon which the employee gives written notice to the employer of the injury. That date is April 27, 2010. While this Board Member acknowledges the date of accident provisions of K.S.A. 2009 Supp. 44-508(d) are maddening, they are the provisions created by the legislature.

The fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained.[4] The date of accident, based on this limited and somewhat frustrating record, is April 27, 2010, the date claimant's attorney provided notice in writing to respondent of the alleged injuries to claimant. Therefore, the letter from claimant's attorney not only sets the date of accident but also provides timely notice. This Board Member is convinced that the parties will be able to rectify any limitations to this record by the time this matter again comes before the Board.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

---

[4] *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007).

[5] K.S.A. 44-534a.

as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant suffered a series of accidental injuries through April 27, 2010. Therefore, the letter from his attorney on that date constitutes timely notice of accident. The Order of the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated July 6, 2010, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September, 2010.

HONORABLE GARY M. KORTE

c: Garry L. Howard, Attorney for Claimant
Katie M. Black, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge